Reforming the framework for better regulation

Legal Services Board response to BEIS consultation

1 October 2021

Contents

Executive Summary

1. The Legal Services Board (LSB) oversees the regulation of legal services in England and Wales.

2. The main points in this response are as follows:

   a) **Independent regulation of legal professionals is an essential underpinning of the fundamental principle of the rule of law**. While we agree with much of the broad direction of the proposals set out in this consultation, we cannot support proposals that would create greater direct oversight by Government of regulation in this sector. The existing framework of independent regulators overseen by the LSB – which, due to its levy funding mechanism, is independent of both Government and the legal professions **-** is designed explicitly to support the constitutional principle of the rule of law. We do, however, support greater direct accountability to the public through increased transparency and inclusivity in decision making, and that is at the heart of our statutory oversight.

   b) **Much of what the proposals seek to achieve is already delivered within the existing framework for legal services regulation.** The Legal Services Act 2007 ('the Act') avoids prescribing regulations in detail in primary legislation and leaves much of the detail to independent regulators, who have the flexibility to tailor their regulations in the public interest to meet the statutory objectives set out in the Act (which include a requirement to deliver the better regulation principles).

   c) To provide reassurance that legal services is aligned with many of the proposals contained in the consultation, we provide insights into how this works in practice against your themes.

   d) The LSB wishes to highlight that the regulation of the legal services profession was excluded from the regulatory obligations set out in the Small Business, Enterprise and Employment Act 2015 and specifically on fulfilling the obligations to calculate and report on the Business Impact Target (BIT) and the Growth duty. The exclusion was applied in recognition of the different practices applied in regulation by professional bodies and that oversight was, in some cases, already part of the regulatory regimes.

   e) We consider that the regulation of legal services practitioners should be excluded from the proposed reforms.

Introduction

3. The LSB oversees the regulation of legal services in England and Wales. We are an independent body created by the Legal Services Act 2007 ('the Act'), and we are independent from both the legal profession and government. In all our work, we consider how best to promote the eight statutory regulatory objectives[1] set out in the Act.

4. Our core functions include overseeing the performance of the nine regulatory bodies who carry out day-to-day frontline regulation of legal services, setting the annual fees that practitioners pay them and approving changes to their regulations and regulatory arrangements. We ensure that regulation of legal services is carried out independently of the organisations that represent providers. We also collect evidence on legal needs of individuals, businesses and society more widely and the operation of the market.

5. The Act is principles and outcome-focused and regulators covered by the Act have a statutory obligation to have regard to the better regulation principles (including proportionality). The LSB's oversight role ensures that new regulations comply with the statutory objectives and the LSB must approve changes to regulations and we require an assessment of impact to be carried out and plans to evaluate impact to be provided. The LSB also provides strategic oversight over the regulated professions and promotes the development and adoption of innovative practices, including the use of regulatory sandboxes.

Current practice in legal services regulation

A common-law approach, reducing statutory prescription

6. Legal services regulation was reformed by the introduction of the Act in 2007. The Act has limited prescription, with the regulation of the profession focused on principles-based regulation whereby statutory responsibilities are conferred on the LSB and regulators. This includes a duty to promote the eight statutory objectives and (better regulation principles). The LSB has responsibility for setting the policy framework, providing rules and issuing guidance and we encourage the use of principles-based regulation through our oversight and approval processes. The regulatory bodies have flexibility on how the LSB rules and guidance are implemented for each discipline within the profession but the LSB approval is required for new regulations.

[1] They are: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of the citizen's legal rights and duties; and promoting and maintaining adherence to the professional principles.

A proportionality principle

7. The Act includes a statutory obligation on the LSB and legal services regulators to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. The LSB provides oversight on how the better regulation principles are applied by the legal services regulators. This is also one of the factors that the LSB considers in assessing applications to amend regulations or regulatory arrangements.

Regulators’ role in promoting innovation and competition

8. The Act has statutory objectives including one to promote competition in the provision of services. The concept of innovation is also encapsulated in the Act. The LSB can issue statutory guidance to regulatory bodies on the areas where consideration should be made of market developments.

Delegating discretion to regulators to achieve regulatory objectives

9. This is the approach taken in the regulated legal services sector with oversight provided by the LSB.

Regulatory Sandboxes

10. The LSB developed the Reshaping Legal Services a sector-wide strategy, published in March 2021. In it we note that:

    The sector’s regulators can help to overcome these soft barriers by being proactive and by supporting new entrants with information, sandboxes, innovation funds, strategies and similar initiatives. The SRA and Nesta Legal Access Challenge is an example of how regulators can be proactive and actively facilitate innovation that delivers access to justice benefits. Similarly, the Lawtech Sandbox pilot administered by Tech Nation enables innovators to engage in a coordinated way with multiple regulators in a single forum: the Regulatory Response Unit. As well as a way for regulators to foster innovation, sandboxes can help regulators and innovators understand the risks a product or service may involve. This can ‘de-risk’ the product or service, reduce regulatory uncertainty, and protect consumers. Regulatory sandboxes can help create that safe ‘test’ environment that new technologies need. However, to maintain public confidence, regulatory sandboxes should adhere to certain principles. (Pages 24-25)

Accountability of regulators

11. The LSB has a strong focus on transparency and public accountability. We are accountable to Parliament and to the Lord Chancellor (Ministry of Justice). This

level of accountability was built into the statutory framework taking into account the importance of the independence of the legal profession.

12. In meeting our regulatory objectives: to act by protecting and promoting the public interest; and by protecting and promoting the interest of consumers, the regulation of the legal services profession is accountable to the public and consumers. This accountability is at the heart of the LSB's work through ensuring independent, effective and proportionate regulation. We have increased our expectation that regulators engage more meaningfully with consumers and our recent reforms to our statutory approvals now require regulators to demonstrate effective consultation. Therefore public accountability is an important test of the effectiveness of legal services regulation.

Improving the way businesses are regulated

13. The LSB has a performance framework which is designed to allow a range of oversight activities and interventions. The activities mentioned in this consultation are already widely applied in the legal services sector. The LSB carries out deep dives of the regulators it oversees. Decisions are taken on a risk-basis and where greater assurance is needed on the effectiveness of the regulator in carrying out its statutory responsibilities.

An early regulatory gateway

14. The LSB has a statutory duty to approve the regulatory arrangements of legal services regulators and a core element of the application from regulators is consideration of the regulatory impact of the arrangements on the profession.

Streamlining regulatory impact assessments

15. The LSB has recently consulted on the rules applied to regulators when they want to make changes to their regulatory arrangements. This will create greater expectations on the rigour in assessing the regulatory impact of the changes and also embedding evaluation of the changes at appropriate time in the future (similar to a PIR).

Assessing the impacts of regulation - Post Implementation Review

16. As noted above, we consider that our increased emphasis on evaluation and increased expectations on regulatory impact assessments will promote greater scrutiny of the effectiveness of regulatory changes.

The scrutiny function in the Better Regulation Framework

17. We consider that scrutiny of regulatory proposals should be transparent and in the public interest. In legal services independent regulation is critical to the effectiveness of the framework.